No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Rambo acknowledges that Section 22's one-year limitation is clear and that it has survived numerous attempts at legislative change. He does not challenge the fact that the Ninth Circuit *did* "indefinitely extend" that limitation period because it wished to forever preserve to Rambo the opportunity to receive compensation if he at some future time suffered economic harm. Unable to dispute the what, why, or effects of the Ninth Circuit's action, Rambo offers three defenses to what would otherwise be a transparent trespass upon Congress's role. Not one withstands scrutiny.

The first of Rambo's arguments is that Section 8(h) of the LHWCA, 33 U.S.C. Section 908(h)

> [C]learly authorize[s] Courts to award whatever benefits it [sic] deems appropriate if, in the Court's opinion, loss MAY at some future date materialize.

(Brief in Opposition, p. 19) The language upon which Respondent Rambo focuses appears in the final portion of Section 8(h), in the *proviso* authorizing consideration of "the effect of disability as it may naturally extend into the future" when determining the wage-earning capacity of a disabled worker. Rambo, however, fails to mention that Section 8(h) authorizes consideration of those future effects only *after* it is determined that the worker's actual earnings do *not* "fairly and reasonably represent his

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In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

wage-earning capacity," i.e., only *after* there is found to be some degree of existing "disability."

The "plain language" of Section 8(h) trumpeted by Respondent Rambo requires the proven presence of *some* economic harm before the extent or degree of that harm may be assessed by reference to a broad variety of factors, including the inherently speculative future. Liability must exist before damages can be assessed. In this case, the Administrative Law Judge charged with hearing and evaluating the evidence determined that the liability arising out of Rambo's earlier wage-earning capacity loss had ended.

Rambo's second argument is that Congress's decision in 1984 to *retain* both the existing one-year limitation in Section 22 and the final clause of Section 8(h) is an implicit endorsement of the "nominal award" concept.[1]

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[1] Rambo attempts to shoehorn the comments accompanying the proposed amendments in 1983 into the principle that reenactment of language which has received consistent judicial construction is strongly suggestive of Congress's intent. The effort is forced. Although the Fifth Circuit's opinion in *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), was issued before the Committee comments were written and *may* have been the subject when the Committee referred to the problem caused by "Administrative Law Judges [who] felt compelled to award benefits at the rate of one percent," the two other circuits which have approved nominal awards in some factual circumstances did not express their views until 1984 and 1989. Rambo also neglects to mention that the Benefits Review Board itself has consistently *rejected* the practice. *See Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988). There simply was *no* "consistent judicial construction" to be endorsed by the amendments' rejection.

According to Rambo, Section 8(h) should trump Section 22 whenever an Administrative Law Judge, the Benefits Review Board, or a Court of Appeals believes the one-year limitation unreasonably short.

The fact that the legislative history offers no clue about the Conference Committee's reasons for rejecting the proposed amendments and the clear possibility that Congress may have thought the proposed cure more damaging than the disease are ignored by Rambo. Instead, he argues that he should receive precisely what Congress refused to provide in 1984 – an unlimited modification period. In fact, Respondent Rambo seeks – and the Ninth Circuit provided – *more* than Congress's acceptance of the rejected proposals would have afforded – *both* a current award *and* an unlimited modification period.

The third of Rambo's arguments – the one that blinds him to the differences among the nominal award analyses of the Second, Fifth, Ninth, and District of Columbia Circuits – is that it is a "distinction without a difference" to argue – as Metropolitan does – that a mere possibility of future economic harm is an insufficient basis for any award, nominal or substantial.[2] According to Rambo,

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[2] The Fifth Circuit approved a nominal award when the Administrative Law Judge determined that "some degree of economic harm" existed. The District of Columbia Circuit followed suit when the evidence demonstrated that the claimant "suffered, or will suffer" economic harm. The Second Circuit limited its approval to cases in which evidence proved future loss to be a "predictable probability." *Hole, supra*, at 773. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 800 (D.C. Cir. 1984); *La Faille v. Benefits Review Board*, 884 F.2d 54, 62 (2d Cir. 1989). The

"Only one being knows the future." (Brief in Opposition, p. 19)

Doubts which remain for all but the deities may not sustain an award of LHWCA benefits. *See Director, OWCP v. Greenwich Collieries/Maher Terminals*, 114 U.S. 2251 (1994). To modify benefits pursuant to Section 22, the LHWCA requires that the employer prove by a preponderance of the evidence that the economic disability no longer exists. Metropolitan met that burden. The possibility that disability might recur – the Ninth Circuit's doubt that the current absence of economic loss would forever continue – is an insufficient basis for a continuing award.

CONCLUSION

Nominal awards may be appropriate in cases in which there is proven to be a current disability of uncertain degree. As noted in *Hole, supra*, there may be circumstances in which the use of a nominal figure is no more or less arbitrary than "picking a [more substantial] 'disability' figure out of thin air." *Hole*, at 773.

What this case questions is the propriety of a nominal award when there exists only a *possibility* of economic

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Ninth Circuit ordered a nominal award when it perceived a "significant possibility" of economic harm at "some future time." *Rambo v. Director, Office of Workers' Compensation Programs (Rambo II)*, 81 F.2d 840, 844 (9th Cir. 1996). (App. 14a) To Metropolitan, the distinction between what is and what might be and the impact of that distinction upon burdens of proof and persuasion are *very* significant.

harm in the indefinite future and when the sole rationale for the award is to indefinitely extend a clearly stated statute of limitations. Nothing in the language or history of the LHWCA carves from Section 22's time limitation an exception of the magnitude created by the Ninth Circuit.

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Respectfully submitted,

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